regulations, which have the general purpose of the sentence in view, and are not purely arbitrary. But if female prisoners were subjected to regulations shocking to the modesty of a virtuous woman, or male prisoners to those of an indecent nature, there should be no difficulty in holding that their rights were violated. Convicts have all the rights of other citizens, except as these are limited by the sentence of the law and proceedings for its proper execution.

If the cutting off of the queue could be defended as a sanitary regulation, or as being needful and proper to prevent escapes, or as removing something that interfered with the performance of the convict's labor, when labor is a part of his punishment, there would be a show of reason for saying that the regulation came within the implied powers of the prison authorities. But nothing of this sort can be pretended. The wearing of the hair in this way is no more unhealthy than female fashions of the hair in general, and the convict can be kept as well and can work as well with it on as with it off. The regulation for the cutting off of the queue is, therefore, a regulation not important to the preservation of discipline in the prison, or to the due enforcement of the sentence to imprisonment, and is therefore illegitimate and illegal.

The avowed reason for establishing this regulation was that the dread of its enforcement would compel obedience to the law by persons who feared neither the fines nor the imprisonment which the law imposed. Nothing more plainly than this avowal could show that the learned judge was right in holding that the regulation imposed a punishment. It could not have done so more distinctly had it provided that every day the convict remained in prison, he might be subjected to the discipline of the whip. No doubt this might have deterred some persons from the commission of crime, but it would not for that reason become legal. Punishments are limited by the sentence of the law, and whatever is imposed beyond that is illegal, irrespective of its tendency. Moreover, the law itself is limited in respect to the punishments for which it may provide. The constitution prohibits those of a cruel and unusual nature, but the requirement of equal protection of the laws to all persons is also prohibitory. When the law imposes a punishment which only a certain class of persons, because of peculiar but innocent habits, sentiments or beliefs, can feel, and imposes it for the avowed purpose of affecting this class as others are not affected, it seems plain that not only is the equal protection of the laws denied to the class, but that they are directly and purposely subjected to pains and penalties which others, of different habits, sentiments or beliefs, are never expected to feel. T. M. C.

Supreme Court of Indiana.

BOWEN ET AL. *v.* SULLIVAN.

The finder of lost property has a title to it superior to that of any other person except the loser or real owner. The place of finding makes no difference in this rule.

An employee in a paper factory, whilst engaged in assorting a bale of old papers purchased by the proprietor for manufacture, found certain lost, genuine bank-bills enclosed in a clean, unmarked and undirected envelope, which formed part

of such bale; and, to ascertain whether they were genuine, delivered them to the proprietor, on his promising to return them; but he retained the same, notwithstanding the demand of the finder, who brought suit for the value thereof. *Held*, that the plaintiff was entitled to recover.

FROM the Carroll Circuit Court.

Ellen Quinn, a minor, found two fifty-dollar bank-bills on the premises of the appellants, and handed the same to them, requesting to be informed if they were genuine. Appellants retained the bills, declining to return them to the finder, on demand. The appellee, Catherine Sullivan, the guardian of said minor, instituted this suit to recover the value of said bills. Issues were formed and tried by a jury; verdict for the plaintiff; motion for a new trial overruled, and judgment on the verdict.

J. Applegate, for appellants.

C. R. Pollard, for appellee.

The opinion of the court was delivered by

PERKINS, J.—The pleadings, on which the cause was tried, were good on demurrer, but some of them might have been subject to a motion to make more certain: *Hart* v. *Crawford*, 41 Ind. 197; *Doman* v. *Bedunnah*, 57 Id. 219; *Wilson* v. *Kelly*, 58 Id. 586.

As bearing on this part of the case, we cite *Tancil* v. *Seaton*, 28 Grat. (Va.) 601, where it is decided, that "the finder of a bank-note, as against a bailee without reward, to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee."

On the trial, the court, of its own motion, gave to the jury the following instructions, which were all that were given in the cause:

"The third and fourth paragraphs allege, in substance, that the plaintiff's ward found two bank-notes, of the denomination and value of fifty dollars each, on the defendants' premises (in their paper-mill); that her said ward handed said notes to one of the defendants, to ascertain if they were genuine, and upon a promise that he would return them to her; that the defendants kept said notes and converted them to their own use; therefore she prays judgment, &c.

"The second and third paragraphs of the answer aver, in substance, that the defendants are co-partners, engaged in the manufacture of paper, in Carroll county; that, for the purpose of their business, it is their custom to purchase rags of different colors and qualities; that the said bank-notes were purchased with other rags, in Kansas, by the defendants, and are their property; that the plaintiff's ward took said bank-notes from their premises, without right, but afterward returned them to the defendants.

"The burden of proof is upon the plaintiff. In order to entitle her to recover, she must prove the material allegations of her complaint by a preponderance of the testimony; that is, by a fair weight of the testimony. The finder of lost property is the owner of it as against every person except the loser, or real owner. If you believe from the evidence, that the plaintiff's ward found the said bank notes in the defendants' paper-mill, and if you believe said bank-notes were lost property, you should find for the plaintiff. The primary question is, were the notes lost property? If they were, it can make no difference whether they were found upon the highway, in the defendants' paper-mill, or in their dwelling-house; the difference between the highway, the place of business or the dwelling-house (so far as this case is concerned), is a difference only as to the degree of privacy; the place of business is more private than the highway, and the dwelling-house is more private than the place of business.

"But, if the bank-notes were lost property and the plaintiff's ward found them, it does not matter where she found them; they belong to her as against every person but the loser, or real owner. But, if you believe from the evidence, that, as alleged in the third and fourth paragraphs of the answer, the defendants had purchased said bank-notes as rags, then they were not lost property, and you should find for the defendants.

"As I have already said to you, the plaintiff must make out her case by a preponderance of the testimony. You cannot indulge in any presumption in her favor, but you have a right to draw natural inferences from all the facts proven; and, if you believe from the evidence, that the said bank-notes were found by the plaintiff's ward among the rags or paper belonging to the defendants, in their mill, and that said bank-notes got there by accident, and were not placed there purposely by the person of whom the rags and papers were purchased by the defendants, and the defend-

ants did not know they were among the rags when they made the purchase, then I instruct you that said bank-notes were lost property, and you should find for the plaintiff."

The evidence in the cause consisted of oral testimony.

Ellen Quinn's testimony was as follows:

"I am acquainted with the defendants. In May 1876, they were engaged in the manufacture of paper, about half a mile from Delphi. I am a half-sister of Ann Sullivan, who was working for the defendants in the spring of 1876. I went to the paper-mill of the defendants in the spring of 1876. I was not in their employ. My sister had been, for a week or two. I found some money in the paper-mill of defendants, in May 1876, on Wednesday. Up to that time I had never been in the employ of the defendants. I found the money in the mill, on the floor, in a clean envelope, not in a package. In about five minutes afterward I showed it to Charley McClane. He took it to Huchtenhouser to see if it was good, and Huchtenhouser took it to the defendant Abner T. Bowen. There were two fifty-dollar bills in the envelope. I found the envelope three or four feet from where the girls were assorting papers. There was no name or other mark upon the envelope. I threw the envelope back on the floor. The next morning I asked the defendant Abner T. Bowen for the money, and told him he promised to give it back. He did not give me the money, but offered to give me ten dollars, if I would be satisfied, which I refused to take. I asked him if he had bought this money or lost it. He said he had not. This money has never been returned to me. Charlie McClane was the first person I told about having found it. The defendant, Abner T. Bowen, got this money for the purpose of seeing whether it was good or not. He said it was genuine. I am sixteen years old."

And upon cross-examination this witness further testified

"I found this money in the room of the paper-mill where they assorted old papers for the purpose of manufacturing the same into new paper. The room was about 15 by 30 feet. There were five persons engaged there at the time in assorting. The old papers are received in bales which are placed upon the floor, cut open, and the contents taken out and put in screens. The persons then engaged there in assorting the papers were Sarah and Mary Alberts, Annie McClane, Mattie Kist and Alma Sullivan. I asked Abner T. Bowen if the money was good. He said it was. I asked him for

it. He asked me, if I thought the money belonged to me. I told him I thought it did until the proper person came. I then asked him, if he had bought the money or lost it. He said no. I meant by that, if he claimed it as his property. He said he did not. I told him I would like to have it. He offered me ten dollars, and asked me if I would take that and be satisfied. I said I would not. The room where this money was found is the assorting room of the paper-mill, up stairs. The envelope, in which it was, was nice, clean and new, and had no writing or mark upon it. There were papers scattered all over the floor when I found it. I don't think there was a space on the floor more than four inches square, not covered with old papers. I found this money about 3 o'clock in the afternoon, and when I picked it up was nearer to Annie McClane than any person else, and about three or four feet from her. There were three screens in this room and two persons working at each."

Abner T. Bowen, one of the defendants, and a witness for the defendants, testified as follows:

"Charlie and Huchtenhouser came to me together, Charlie said 'she wants the money back, even if it is not good.' Don't know that I said anything to him about returning it. The next morning I saw Ellen Quinn in the machine-room. She said, 'what about the money?' I said, 'it is good money; who do you think this money belongs to?' She said she supposed it belonged to me, but thought she needed it more than I did. I asked her what she would do about it. She said, just as I said. I then offered her ten dollars. She shrank back and refused to take it. Said I ought to give her at least half of it; if she had lost one hundred dollars and any one had found it and brought it to her, she would have divided equally with them. She repeated several times that she needed it worse than I did. I said that had nothing to do with it. She said she ought to have thrown it in the papers, and it would have been ground up, and I never would have received any benefit of it. I said nothing about not having bought it. That is about what I said, and would think about it. She said she found it in an envelope marked 'Kansas City.' She was working for us that week and the week before, receiving wages for her labor. I never gave her any authority to take those bills from the place where they were found."

On cross-examination he further testified:

"If that money was found in a bale of papers, we had bought it and paid for it. Huchtenhouser kept the accounts with the girls in the assorting room; so I can not certainly say whether Ellen was in our employ the day the money was found. I did not know that money was there. We did not get it by accident. I think it was purchased with old paper. I think Ellen was working for us the day the money was found. I think I have a memorandum of the day the money was found, but can't now tell the day nor month. It was entered on our cash book the day it was found. At the time I got the money I did not intend to give it back."

The testimony of the foregoing witnesses represents the conflict in the testimony in the case on the part of the plaintiff and defendants. There was no evidence that the envelope containing the money had been accidentally or carelessly laid down or dropped in the paper-mill by a visitor at the mill, so that the cases of *McAvoy* v. *Medina*, 11 Allen 548, and *Lawrence* v. *The State*, 1 Humph. 227, are not applicable in the case at bar.

There was no evidence that the envelope was purchased by special contract, including it and its contents, so that the case of *Merry* v. *Green*, 7 M. & W. 623, is not applicable.

Ever since the case of *Armory* v. *Delamire*, 1 Strange 505, in which a chimney-sweeper's boy, having found a jewel, left it with a goldsmith to ascertain what it was, was held entitled to recover it, the law has been steady and uniform that the finder of lost property has a right to retain it against all persons except the true owner. *Tancil* v. *Seaton*, 28 Gratt. 601; *Lawrence* v. *Buck*, 62 Me. 275. And ordinarily the place of finding is immaterial. *Tatum* v. *Sharpless*, 6 Phila. 18, and cases cited.

The jury in the case now before this court might have found from the evidence that an envelope was picked up from the floor of the defendants' paper-mill by Ellen Quinn; was opened by her and found to contain two $50 bills; that the bills were taken by her and the envelope returned to the floor; that the envelope was purchased by the defendants at the rate of two and a half cents per pound, as waste-paper, raw material, to be used in the manufacture of paper; that neither the seller of the envelope nor the buyer of it knew that it contained the bills in question, and only sold and bought and paid for the envelope; that the rightful owner of the money is still unknown. Had the notes or bills in question

been lying upon the floor, unenclosed when found, the case would have fallen within most, if not all, the approved authorities.

The distinguishing feature of the case is, that the bills were found contained in an article of property which had been purchased by and belonged to the defendants. Did that fact carry with it the property in the bills in question?

The case more nearly in point than any other which has fallen under our observation is *Durfee* v. *Jones*, 11 R. I. 588. DURFEE, C. J., said: "The facts in this case are briefly these: In April 1874 the plaintiff bought an old safe and soon afterwards instructed his agent to sell it again. The agent offered to sell it to the defendant for $10, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for $10, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old-fashioned, of sheet-iron, about three feet square, having a few pigeon-holes and a place for books, and back of the place for books a large crack in the lining. The defendant shortly after the safe was left, upon examining it, found secreted between the sheet-iron exterior and the wooden lining a roll of bills amounting to $165, of the denomination of the national bank-bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was found. The owner of the money is still unknown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money, but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent."

The court held, that, as the purchase was of the safe, not the safe and its contents, the money was not embraced in the purchase.

"The plaintiff" (say the court) "claims that he is entitled to have the money by the right of prior possession. But the plaintiff

never had any possession of the money, except, unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right. The case at bar is in this view like *Bridges* v. *Hawkesworth*, 15 Jurist 1079. In that case, the plaintiff, while in the defendant's shop on business, picked from the floor a parcel containing bank-notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendants as owner of the shop in which they were found. 'The notes,' said the court, 'never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there.' The same in effect may be said of the notes in the case at bar; for though they were originally deposited in the safe by design, they were not so deposited in the safe, after it became the plaintiff's safe, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for them. The case at bar is also in this respect like *Tatum* v. *Sharpless*, 6 Phila. 18. There it was held, that a conductor who had found money which had been lost in a railroad car was entitled to it against the railroad company."

It is also claimed in this case, that the finding of the money was a wrongful act, and that, therefore, the defendants (appellants) have a right to hold the money. We do not concur in this view. The defendants insist that Ellen Quinn, the finder, was in their employ as a rag-assorter, and that, therefore, what she found while so in their employ belonged to them.

The evidence would have sustained such a finding and in support of the verdict, perhaps we should have been in favor of it. If she was so in the defendant's employ. the finding of the money was not wrongful. In the elaborate case of *Brandon* v. *Planters' and Merchants' Bank of Huntsville*, 1 Stewart 320, it was held that lost property found by a slave belonged to his master, but we have found no case to which this doctrine has been applied as between employer and employee. See *Tatum* v. *Sharpless*, and *Durfee* v. *Jones*, *supra*.

See, on this general subject, note to *Bailey* v. *The State*, 52 Ind. 462: *The N. Y. & Harlem Railroad Co.* v. *Haws*, 56 N. Y. 175.

It is claimed that the appellants, in purchasing the envelope containing the bills by weight, purchased the bank-bills in ques-

tion. Their existence was unknown when the envelope was purchased, and their weight was so infinitesimally small, compared with their value, that we do not concur in this proposition. It is unreasonable.

The judgment is affirmed, with costs.

That the finder of a lost chattel has a special property in the article found which will entitle him to possession thereof as against all the world but the real owner, is and has been the general rule of law ever since the decision by Lord Chief Justice PRATT in *Armory* v. *Delamire*, 1 Strange 504, where the chimney-sweeper's boy who found the jewel was held entitled to it as against all but the real owner, and was allowed to recover from one who subsequently withheld it from him. This rule has not been departed from, and has been enforced in some quite recent cases. See *Lawrence* v. *Buck*, 62 Me. 275 (1874); *Tancil* v. *Seaton*, 28 Gratt. 601 (1877); *Durfee* v. *Jones*, 11 R. I. 588 (1877). Trover may be maintained by the finder, possession being a sufficient title in the absence of a superior one, upon which to maintain that action: *Sutton* v. *Buch*, 2 Taunt. 302 (1810); *Clark* v. *Maloney*, 3 Harrington 68 (1839); *Brown* v. *Ware*, 25 Me. 411 (1841); and the defendant in trover cannot set up as a defence a title in a third person without deriving to himself title from that third person: *Pinkham* v. *Gear*, 3 N. H. 484 (1826); *Duncan* v. *Spear*, 11 Wend. 53 (1833); *Harker et al.* v. *Dement*, 9 Gill 7 (1850).

It is, however, rarely that a contest has arisen, nor at the present day can we easily imagine that a contest could arise, over the rule itself, but in many cases it has been alleged either that what is called a finding was not such in law, or that the circumstances arising from various sources connected with the nature of the thing found, the place of finding or the relations borne by the finder to a third person took the case in question out of the general rule. Some of these excepting circumstances were alleged to exist in the principal case, and the plaintiff's right was claimed to have been controlled by the circumstances, that the notes were found on the floor of the defendant's mill, that the notes had probably been purchased amongst some rags by the defendants, which it was claimed gave a right of possession, though the purchase was an unwitting one; and, though this claim seems to have been very doubtfully supported by the evidence, by the circumstance that at the time of finding the finder was in the defendants' employment. The case then suggests sundry considerations with regard to the law governing the rights of a finder as against all but the true owner of the article found, and we propose to consider,

1st. When property is considered as lost and found.

2d. How the special property acquired by the finder is affected by the *character* of the thing found.

3d. Whether the rights of the finder are affected by the *place* in which the lost article is found.

4th. How far the rights of the finder are affected by a relationship subsisting between him and a third person as that of master and servant; and

5th. We will consider the claim which a finder has against the true owner for compensation for finding and recovering an article, or for expense incurred in taking care of it; though this subject is rather suggested by than involved in the principal case.

First, then—*When is property considered as lost and found?* On this head it

may be remarked that a thing must be really lost to the owner before it can be found; and property which the owner merely and intentionally lays down or knowingly deposits in a place and then forgets for a time where he has put it, is by no means to be considered in a legal view as lost. As said by BREESE, J., in *Lawrence* v. *The State*, 1 Humph. 228 (1839), "The loss of goods in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed-chamber, I may leave them behind me; but if that is all, I can not be said with propriety to have lost them. To lose is not to place anything carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there." In that case a customer in a barber's shop had placed his pocket-book upon a table therein, and his attention being attracted by a fight in the street, he had gone out of the shop forgetting the pocket-book, which the barber afterwards picked up and appropriated; it was held by the court that the pocket-book had not been lost, and therefore that the act of the barber in appropriating it was not finding but felonious taking. Somewhat similar in principle to this case was *McAvoy* v. *Medina*, 11 Allen 548 (1866), where the plaintiff picked up a pocket-book in a barber's shop and handed it to the barber to keep for the true owner. The true owner did not appear and the plaintiff sued the barber for the book. In the opinion of the court, DEWEY, J., said, "This property is not under the circumstances to be treated as lost property in that sense in which the finder has a valid claim to hold the same until called for by the true owner. The property was voluntarily placed upon a table in the defendant's shop, by a customer of his, who accidentally left the same there and has never called for it. The plaintiff also came there as a customer and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant owner to use reasonable care for the safe-keeping of the same until the owner should call for it." His honor then distinguished the case from *Bridges* v. *Hawksworth*, *infra*, and remarked on its resemblance to *Lawrence* v. *The State*. In *Kincaid* v. *Eaton*, 98 Mass. 139 (1867), the same doctrine was held, although in that case the owner of the property had himself considered it so far lost that he had advertised a reward for its recovery. The property in question, again a pocket-book, was picked up from a desk in a banking-house, where the owner had left it accidentally, on going out of the bank, by a boy who shortly after came into the bank on an errand. Led by the advertisement the boy took the pocket-book to the owner, who while giving him a gratuity, refused to pay the reward offered; an action being brought therefor, the court gave judgment for the defendant, on the ground that the reward was offered for the recovery of lost property and that as the pocket-book was not, legally speaking, lost, the reward was not earned. See also, to the same effect, as to what constitutes losing, *State* v. *McCann*, 19 Mo. 249 (1843); *People* v. *McCarren*, 17 Wend. 460 (1837).

As to the finding it may be remarked, in addition to what has incidentally been suggested by what has gone before, that the finding must be in good faith, as said by STROUD, J., in *Tatum* v. *Sharpless*, 6 Phila. 18, "The right of the finder depends on his honesty and

the entire fairness of his conduct. The circumstances attending the finding must manifest good faith on his part. There must be no reason to suspect that the owner may be known to him or might have been ascertained by proper diligence." Therefore, if one find goods whose owner he knows or can readily ascertain from marks upon the goods, or from the circumstances under which he finds them and appropriates them to himself, he will not be regarded as a finder but as guilty of larceny: *Merry* v. *Green*, 7 M. & W. 623 (1841); *Wynne's Case*, 1 Leach C. C. 460 (1784); *Cartwright* v. *Green*, 8 Ves. 405 (1803); *State* v. *Weston*, 9 Conn. 527 (1833). And this is the case even if his intentions on first finding the goods were honest, if he afterwards determine to appropriate them to himself: *Wynne's Case*. Besides this, the possession acquired by finding must be one known to the finder himself as such; no mere physical possession, as for instance that of bills hidden away in the cracks of a chest, or in a secret drawer without knowledge on the part of the owner of the receptacle, of their existence, or as in the principal case, notes in a bundle of rags, will constitute a genuine possession acquired by finding —it must be by an intelligent, known act. An excellent illustration of what is not a good possession is afforded by the case of *Durfee* v. *Jones*, 11 R. I. 588, and also by *Merry* v. *Green*, *supra*, though the act through which possession was claimed to have accrued was not finding but purchase. The plaintiff had purchased a secretary, at the sale of a gentleman's effects, for the sum of 1*l*. 6*d*. In repairing the article there were discovered some secret drawers, and in them some notes and guineas, which the plaintiff appropriated. He was arrested on a charge of larceny, but was discharged, and then brought an action for assault and false imprisonment, and obtained a verdict. PARKE, B., in giving the opinion of the Exchequer in granting a new trial, said, "It was contended that there was a delivery of the secretary and the money in it to the plaintiff as his own property, which gave him a lawful possession and that his subsequent misapplication did not constitute a felony. But it seems to us that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it nor the vendee to receive it; *both were ignorant of its existence*, and when the plaintiff discovered * * * the purse and money it was a simple case of finding," and, of course, in that point of view, the *bona fides* of the plaintiff's action became of importance. We may conclude then, that if a person should find an article and thereby acquire a special property therein, and after it had passed out of his possession another should discover therein money or other valuables, of which the finder had known nothing, the special property in the receptacle would give to the finder no title to the after-discovered contents.

2. The second matter to be considered is: *How the special property acquired by the finder is affected by the character of the thing found.* The general rule as to a chattel, properly so called, has been already stated; as to choses in action it would seem to be the rule that the finder obtains no right either to the thing represented or the instrument of evidence found. As a familiar example of this may be instanced, the finding of a bill of exchange or promissory note, where the finder acquires no such property as will enable him either to defend in trover or to maintain an action against the maker or acceptor: Byles on Bills 360. This rule, however, is by no means of universal application, and at the present day the law would seem to recognise the fact that there are choses

in action which generally pass and are treated as chattels, and as to them to allow a special property to be acquired by finding as in the case of chattels. This conclusion was not, however, arrived at at once, In *McLaughlin* v. *Waite*, 9 Cowen 670 (1827) which was a case involving the right of the finder of a lottery ticket to recover the money called for by it, SAVAGE, C. J., compared the lottery ticket to a bank-note, and held that there could be no recovery. On appeal (5 Wend. 404), in affirming the judgment of the Court below, WALWORTH, Ch., said: "This principle [*i. e.* the rule as to chattels] is not applicable to the present case. A negotiable instrument, a banker's check, is a mere chose in action or evidence of the right of the real owner; the lottery ticket vendor's certificate can have no greater validity. All property in choses in action must depend on a contract either express or implied. It is not property but an evidence of property. * * * If property is abandoned it is in a state of nature, and the first possessor is entitled to it; but if a right in action or contract for the delivery of property is voluntarily relinquished by the person entitled to the same, the right is gone." It may be noted that the Court of Appeals by no means unanimously agreed in the opinion of the chancellor, for ALLEN, Senator, delivered a strong dissenting opinion, and the vote on affirmance was fifteen for and ten against. We much question whether the case would be considered authority at present, and the reasoning of the chancellor has been criticized in a later case, which seems to be a much better exponent of the law as to such choses in action as bank-bills. In *Tancil* v. *Seaton*, 28 Gratt. 601 (1877), a bank-note had been found by the plaintiff who intrusted it to the defendant, from whom it was stolen, and an action was brought to recover its value. Amongst other defences it was set up that property in a bank-note could not be acquired by finding. BURK, J., after holding that money would follow the rule of *Armory* v. *Delamire*, said: "Bank-notes are not money in a strict sense,* * * but for most purposes, as the transaction of business and by common consent, they are considered and treated as money. 'They are not esteemed' says Lord MANSFIELD, 'as goods, securities or documents of debt; but are looked on as money, as cash in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes.' * * * *Miller* v. *Race*, Burr. 452. Such being their character we can see no good reason why the finder of a bank-note of a solvent institution does not acquire by the finding the same title as the finder of a personal chattel, and why he is not entitled to the same remedies against third parties." We may note that *McLaughlin* v. *Waite*, would seem to be of doubtful authority, except possibly as to the chose in action, (viz: a lottery ticket), directly involved, even in New York, for in *Matthews* v. *Hansell*, 1 E. D. Smith 393; (1852), the contest was over some bank-notes which had been found by the plaintiff, and the New York Common Pleas did not apparently consider the character of the property in question any obstacle to a recovery. To sum up, we think, that on this head the law may be stated: That while in general the finding of a chose in action confers no title upon the finder, yet choses in action which by the common consent and the current action of men are treated as chattels will be considered as supporting a special property in their finder.

3. *As to whether the rights of the finder are affected by the place in which lost chattels are found.* It must here be premised that the place of finding is not here considered where it enters

into the question of the *bona fides* of the finder, as in *Lawrence* v. *State*, *Wynne's Case*, and cases of that class, but only as to whether it affects the title acquired by a *bona fide* finding. On this head the rule would seem to be that the place of finding makes no difference in the title of the finder, and that the owner of the premises upon which a chattel is found, acquires no title to the chattel as a *quasi accretion*. This is the English doctrine, and, although in *Matthews* v. *Hansell*, *supra*, WOODRUFF, J., said that he would hesitate to endorse it, may be regarded as the law in this country also. It is probably best exemplified in England by the case of *Bridges* v. *Hawkesworth*, 15 Jurist 1079 (1851), and in the United States by the carefully considered case of *Tatum* v. *Sharpless*, decided by the District Court of Philadelphia, at a time when that court was composed of SHARSWOOD, P. J., STROUD and HARE, JJ. In the first case, the plaintiff had picked up a parcel of Bank of England notes on the floor of the defendant's store, which he had entered on business, and had given them to the defendant to keep for the owner. The notes were duly advertised, but were never claimed by the owner. After three years the plaintiff demanded the notes, but the defendant refused to surrender them. PATTESON, J., said: "The case resolves itself into the simple point * * * whether the circumstance of the notes being found in the defendant's shop gives him, the defendant, the right to have them as against the plaintiff who found them. * * * It was well asked on the argument if the defendant has the right *when* did it accrue to him? If at all it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked into the shop [street?] and then found by some one passing by; could it be contended that the defendant was entitled to them, from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant nor within the protection of his house before they were found, as they would have been had they been intentionally deposited there."

In *Tatum* v. *Sharpless*, the plaintiff, a conductor of a street-car, found in his car a pocket-book, which he delivered to the defendant, the receiver of the railway company, who duly advertised it. The custom of the company was to retain lost articles for a year, and then, if not called for, to return them to the finder. A year having elapsed and no claimant appearing, the conductor applied for the pocket-book, which was refused to him. The court gave judgment for the conductor, saying, after noticing the English cases, "The important point in these decisions was that the place in which a lost article is found does not constitute any exception to the general rule of law that the finder is entitled to it as against all persons except the owner."

4. Upon the question as to *how far the right of the finder is affected by the fact that he stands in the relation of servant to a third person*, the authorities we have met with, with one exception, and that exception more apparent than real, are uniform in substance that the fact does not deprive the finder of his right or vest it in the master. That this is the only rule consonant with reason and justice, will be seen by a very brief consideration of what the relation of master and servant, except in the case of slavery, is. It is a contract for services of a certain kind, specified in the contractor implied from the character of the position, a work assumed

by the servant; as the engagement of a domestic servant as such, without more, would constitute an engagement to perform household duties, perhaps run errands, and do such work as is generally connected with the position of domestic servant; it is not a contract whereby the servant gives up all his rights, or merges his identity in, or surrenders his freedom of action to his master, except so far as the purposes of the contract or position require; of course, whatever he does *as servant*, or within the scope of the contract, is for his master's benefit, but not what he does without such scope. Of course, if a master were to engage a servant expressly to search for lost articles of third persons for him, the lost article found by such servant would become the master's property, but it can be hardly said that in an ordinary case of hiring in any capacity, or for any kind of work, the search for lost articles, or the finding, accidentally, of lost articles of third persons, for the benefit of the master, is in the contemplation of the parties to the contract.

The question was raised in *Ellery* v. *Cunningham*, 1 Met. 112 (1840), where the mate of a vessel had found floating two bales of cotton in port, and it was contended by counsel for the owners of the vessel (citing Bacon's Abr. tit. *Master and Servant*, Reeve's Domestic Relations 343, and 1 Com. on Contracts), that the bales having been found by a servant belonged to his masters, the vessel owners, and therefore, that there was no consideration for a promise by the owners who had received the cotton from the mate to account for it to him if they could not find the owners. SHAW, C. J., did not notice the argument drawn from the relation of master and servant, but held that there was sufficient consideration for the promise in the surrender of the cotton, the mate having acquired a special property therein. In *Matthews* v. *Hansell*, *supra*, a servant who had found bank-notes in the house of her employer, was allowed to maintain an action for them against a third person. In this case the employer assented to the action, so that his rights were not passed upon. The same point was raised in *Tatum* v. *Sharpless*, and there rested on the responsibility of the master for his servant's actions; but STROUD, J., said: "It was suggested that the relation between the plaintiff and the company was that of master and servant, and that probably should the parcel found be surrendered by the company to the plaintiff, the true owner, should he appear and prove his property, might compel its delivery or damages for withholding it. If the law would sustain such a demand, there would be very firm ground for the defendant to stand upon; no authority of the kind was referred to on the argument, and I have not been able to meet any."

The only case which we have been able to find which recognises a right in the master of the finder, as master, for, of course, cases involving seignorial rights stand on an entirely different ground, is *Brandon* v. *Planters' and Merchants' Bank*, 1 Stew. (Ala.) 320 (1828); but in that case the finder was a slave, and the law recognised no right of property in a slave, whose whole time and all his services, of whatever kind, belonged to his owner; consequently, as there was no contractual relation between owner and slave, the case is not to be considered with reference to that relation of master and servant which arises out of a contract either express or implied.

5. The fifth subject—the *claim which a finder has, against the true owner of a chattel found, for compensation for finding or recovering the article, or for expense incurred in the care of it*, is, as we have already remarked, not directly involved in the decision of the principal case, but is suggested by it.

At first sight natural justice might

seem to require that a person who has found and taken care of, or, perhaps, at great trouble and expense, has recovered property belonging to another, should have a lien upon the property, if not for the voluntary service of capture, at least for the outlay upon and services to the property after it has come into his hands. Such, however, is not the case. The civil law is thus stated by Domat: "He who has found a thing that is lost is obliged to preserve it and take care of it in order to restore it to its owner, * * * and whenever he does restore it, whether it be money or any other thing, he cannot detain any part of it, nor demand anything for having found it:" 2 Cush. Domat, pt. 1, tit. 2 IX. § 2. This is recognised as the common law, also by HUNT, J., in *Sheldon* v. *Sherman*, 42 N. Y. 484 (1870). In *Etter* v. *Edwards*, 4 Watts 63 (1838), SERGEANT, J., said: "Treating the defendant as the finder of lost property, it is well settled that he had no lien for expenses gratuitously incurred in taking care of it." See also *Nicholson* v. *Chapman*, 2 H. Blackst. 254 (1793); *Binsten* v. *Buck*, 2 W. Blackst. 1117; *Preston* v. *Neall*, 12 Gray 222 (1838).

Whether the finder having no lien, has even any claim for services or expenses in finding or recovering the lost article, would seem not to be clearly settled. The passage in Domat above quoted and recognised, would seem to deny the existence of any such claim, but in *Nicholson* v. *Chapman*, *supra*, EYRE, L. C. J., apparently considered it a matter of doubt, and said: "This is a case of mere finding and taking care of the thing found for the owner. This is a good office and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if he were refused, a court of justice would go as far as it could go towards enforcing the payment; * * * perhaps it is better that these voluntary acts of benevolence should depend on the moral duty of gratitude. In *Amory* v. *Flynn*, 10 Johns. 102 (1813), the Court (KENT, C. J., THOMPSON, SPENCER, VAN NESS and YATES, JJ.), was of opinion that if a person who had captured some runaway geese had been put to any expense in securing them, such expense ought to be refunded, and SERGEANT, J., in *Etter* v. *Edwards*, *supra*, said: "It seems it remains yet to be authoritatively decided what are the duties of a finder of lost property, and whether he can recover compensation for the labor and expenditure he may voluntarily bestow upon it; or whether, in the absence of a promise of reward, the obligation of the owner is an imperfect one, resting merely on his bounty." See also *Bartholomew* v. *Jackson*, 20 Johns. 28 (1822), where the court seemed to be of opinion that a merely voluntary service conferred no right of action, no matter how great the value of such service, or the loss incurred in its performance.

While, however, the finder has, as such, no lien, and while, for the mere finding his right to compensation even is doubtful, though expense is involved therein, yet if he necessarily lays out expense upon the article found, he has a right to recover compensation therefor. Again, to quote Domat: "The person to whom one restores the thing which he had lost, is obliged on his part to repay the money that has been laid out in keeping the thing or in delivering it to him, as if it was some strayed beast which it was necessary to feed, or the carriage of the thing from one place to another, had obliged the person in whose custody it was, to be at some charges, or, if any money had been laid out in advertisements or in having the thing cried to give notice to the owner." In *Preston* v. *Neall*, *supra*, METCALF J. said: "The law which is applicable to cases of deposit by finding * * * is to be applied to this case * * * although in

cases of the deposit above mentioned the depositaries have no lien on the property, yet we are of opinion that they are legally entitled to compensation for the care and expense of keeping and preservation." See also *Chase* v. *Corcoran*, 106 Mass. 286 (1871).

Of course what has been said as to the non-existence of a lien in favor of the finder does not apply in cases where a lien is given by contract. It is well settled that a lien may be given by contract (*Baker* v. *Hoag*, 7 Barb. 113 (1849)), and the offer of a reward for the finding and return of a lost article, acted upon, is equivalent to a contract, and will confer a lien upon the finder to the extent of the reward. In *Wentworth* v. *Day*, 3 Metc. 352 (1844), in which a reward had been offered for the recovery of a lost watch, SHAW, C. J., said: "If the loser * * * will make an express promise of reward either to a particular person or in general terms to any one * * * and in consequence of such offer one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer and may be revoked. But if before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request and becomes a contract to pay the stipulated compensation. * * * But the more material question is whether under the offer "the finder" had a lien. * * * In many cases the law implies a lien from the presumed intention of the parties arising from the relation in which they stand. Take the ordinary case of the sale of goods where the parties are strangers to each other, * * * the vendor has a lien on the property for the price, and is not bound to deliver it till the price is paid, nor is the purchaser bound to pay till the goods are delivered. They are acts to be done mutually and simultaneously. * * * [In the present case] the natural, if not the necessary implication, is that the acts of performance were to be mutual and simultaneous; the one was to give up the watch on payment of the reward; the other to pay the reward on receiving the watch." See also *Cummings* v. *Gann*, 52 Penn. St. 484 (1866). We may also remark that where a reward is offered for the recovery of goods, which are naturally devisable, a recovery of a portion of the goods will entitle the person returning them to a *pro rata* share of the reward offered: *Symmers* v. *Frazier*, 6 Mass. 344 (1810). It must, however, be noted, that in order to sustain a lien, the reward offered must be of a definite character, a specified sum, as the law does not favor indefinite liens, and therefore, the offer of a "reward," a "liberal reward," or a "suitable reward," will not entitle the finder to hold the article found until what is a proper, liberal or suitable reward is settled. The question is well discussed in *Wilson* v. *Guyton*, 8 Gill 213 (1849), where the plaintiff had offered a "liberal reward" for the recovery of his horse, and, having possibly rather peculiar views of liberality, had refused to give the defendant three dollars, the amount claimed by him, whereupon the defendant refused to surrender the horse and action was brought. DORSEY, C. J., while recognising the law to be that where a reward was offered a lien would be given, said: "But in the case before us, there is no ground for the implication of such a lien from the compact of the parties. There was no fixed or certain reward offered. * * * The offer was to pay a 'liberal reward.' Who was to be the arbiter of the liberality of the offered reward? It could not be supposed that the owner by his offer designed to constitute the recoveror of his property, the exclusive judge of the amount to be paid him as a reward, and it is equally unreasonable and unjust to say that the owner should

be such exclusive judge. In the event of a difference between them upon the subject, the amount to be paid must be ascertained by the judgment of the appropriate judicial tribunal. This would involve delays incident to litigation, and it would be a grave perversion of the intention of the owner to infer from his offered reward, an agreement on his part that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee * * * such a lien would rarely be valuable, except as a means of oppression and exaction, and therefore the law will never infer its existence, either from the agreement of the parties or in furtherance of public convenience or policy."

H. BUDD, JR.

Supreme Court of Minnesota.

MARY GREVE ET AL. *v.* THE FIRST DIVISION OF THE ST. PAUL AND PACIFIC RAILROAD COMPANY.

Where a railroad company enters upon land and lays its track thereon before making compensation to the owner, the latter is not entitled to have the damages estimated by the value of the land, including the road-bed, ties, &c.

Although the railroad was a trespasser, and any accretions to the soil made by a trespasser becomes the property of the owner of the soil, yet in a proceeding to assess damages in such a case the proper measure is only whatever will give just compensation for the land taken.

APPEAL from District Court, county of Ramsey.

John E. Brisbin and *W. P. Warner*, for appellants.

Geo. L. & C. E. Otis, for respondents.

The opinion of the court was delivered by

GILFILLAN, C. J.—It appears that, prior to instituting any proceedings to ascertain and pay the compensation to be paid for taking the land in controversy, the respondent, the railroad company, constructed and was operating its road across such land. It instituted such proceedings in 1870, and in those proceedings the question arises, is the owner entitled to have the amount which the company must pay for the right of way estimated upon the basis of the value of the land, including the road-bed, ties, rails, &c., laid on it by the company, or of the value of the land without these improvements?

The question is new in this court. The cases in this court, referred to by the appellant, have very little bearing upon it. *Gray* v. *First Division St. P. & P. Railroad Company*, 13 Minn. 315, and *Hursh v. Same*, 17 Id. 439, and *Warren v. Same*, 21 Id. 424, hold that until compensation is made to the owner, a railroad com